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No. 81

In The

Supreme Court of the United States

October Term, 1953

National Labor Relations Board, *Petitioner*,

v.

Bill Daniels, Inc., and Walker Motors, Inc.

National Labor Relations Board, *Petitioner*,

v.

Gilbert Motor Sales, Inc.

PETITION FOR REHEARING

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PETITION FOR REHEARING

TO THE UNITED STATES SUPREME COURT AND THE JUSTICES THEREOF:

Your petitioners, BILL DANIELS, INC., WALKER MOTORS, INC., and GILBERT MOTOR SALES, INC., respectfully pray that they be granted a rehearing of the above entitled cause.

Grounds Relied Upon For Rehearing

On January 4, 1954, this Court in acting upon a petition filed by the National Labor Relations Board, which prayed only for the issuance of a writ of certiorari, entered the following Order:

> "*PER CURIAM*: The petition for writ of certiorari is granted and the judgment is reversed. *Howell Chevrolet Co. v. National Labor Relations Board, No.* 34, October Term 1953, decided December 14, 1953."

In the *Howell case,* which the Court deemed controlling upon your petitioners, two grounds were assigned for supporting the National Labor Relations Board's finding of jurisdiction:

(1) That 43% of the merchandise purchased by Howell from a General Motors assembly plant located in California, was manufactured in other states and shipped to California for assembly or distribution.

(2) Sweeping control of Howell's local retail establishment exercised by General Motors by virtue of its "direct dealer selling agreement."

It is the petitioners' belief that the Order of the Court herein is in error in the following respects:

(1) The Court has, at least by implication, approved the Board's practice of incorporating in the record for purposes of judicial review the transcript of a prior and different representation proceeding. This issue was not presented in the Howell case. The evidence properly in the record in these cases does not support the asserted jurisdiction of the Board.

(2) Unlike the dealer in the Howell case none of these petitioners are responsible for the flow of goods in interstate commerce.

(3) These petitioners are individually owned, privately financed, independent retail merchants. They are not agents for, nor are they an integral part of the Ford Motor Company. Their retail establishments are not subject to sweeping control by the Ford Motor Company.

(4) If these petitioners are engaged in an activity affecting interstate commerce within the meaning of the National Labor Relations Act, the distinction between interstate and intrastate commerce has been obliterated.

ARGUMENT

I

This Court's Order of January 4, 1954 granting certiorari does not exclude the following question which was presented as Question 2 in the Board's petition for certiorari:

> "2. Whether the Board, in determining whether a respondent's business affects interstate commerce, properly took official notice of evidence contained in a prior proceeding before it which involved the same respondent and the same issue."

This question was not, moreover, involved in the *Howell case* upon which this Court rests its decision herein.

A brief summary of the facts will illustrate the full impact of this issue. On April 27th, 1948 the United Automobile, Aircraft and Agricultural Implement Workers of America, C.I.O., filed a petition upon which the National Labor Relations Board conducted hearings to determine whether a question of representation affecting interstate commerce existed at the establishments of twenty-one Michigan Ford dealers, one of whom was petitioner Gilbert Motor Sales. These proceedings are reported as Johns Brothers, et al, 84 N.L.R.B. 294. In a subsequent election conducted by the Board on July 21st, 1949, the Union received less than a majority of the votes cast by petitioner Gilbert's employees, thus closing the case as far as Gilbert was concerned.

More than two years after the original petition, Local No. 408 of the United Automobile, Aircraft and Agricultural Implement Workers of America, C.I.O., filed a new petition

on May 15th, 1950 seeking to represent petitioner Gilbert's employees. Another representation hearing was conducted, in which the issue of the Board's jurisdiction over Gilbert was litigated. Subsequently, upon charges thereafter filed by the Union, a complaint hearing was held by the Board. At the conclusion of this hearing, and after the Trial Examiner had already overruled objections to the Board's jurisdiction, General Counsel for the Board was permitted, over objections of counsel for Gilbert Motor Sales, to incorporate in the record of this new proceeding the entire record in the *Johns Brothers case*. In its petition for certiorari, the Board referred almost exclusively to the Johns Brothers record, which deals in large part with the activities of Ford dealers other than petitioner Gilbert.

By this decision the Court has *sub silentio* approved of the Board's practice of incorporating in the record for the purposes of judicial review the transcript of a prior and different representation proceeding. This practice has been adopted by the Board upon the assumption that among the matters of which it may take "official notice" under Section 7(d) of the Administrative Procedure Act is the entire transcript-viz; all pleadings, testimony, exhibits and findings of the former unrelated proceedings. The Board has, we are convinced, misconceived the proper scope of the device of "official notice", using it, not as a means of avoiding unnecessary proof of an obvious, generally acknowledged, or publicly recorded fact, but rather as a broadly applied substitute for evidentiary proof of the Board's assertions of fact which are being contested in the litigation. These petitioners believe that a definition of the legitimate sphere of "official notice" is of paramount importance to administrative agencies, to those who practice before them, and to the judiciary alike. They submit that the issue has not heretofore been expressly adjudicated and that it

merits serious consideration by this Court, assisted by argument and briefs from counsel.

The Court's decision of this issue will also bear directly upon the validity of the Board's findings that petitioners' activities affect commerce. Much of the evidence relied upon by the Board in making its findings against petitioner Gilbert was extracted as a matter of "official notice" from the record of the prior proceeding. We emphasize further that this prior proceeding in any event involved only petitioner Gilbert and not petitioners Daniels or Walker. Nevertheless, the Board in seeking to sustain its findings has in all its briefs and petitions below and in this Court, treated the material contained in the transcript indiscriminately as applying to all three petitioners equally. The evidence properly in the record before this Court will not, we submit, support the claimed jurisdiction of the Board to proceed against petitioners.

II

In its Opinion in the *Howell case*, this Court emphasized that 43% of the merchandise purchased by the dealer from the California General Motors assembly plant was manufactured in other states and shipped to California for assembly or distribution. It was undoubtedly impressed by the realization that should all California Chevrolet dealers cease operations, activity at the General Motors assembly plant in California would grind to a halt. This would necessarily obstruct the interstate flow of parts into California.

How different is the picture presented by the instant cases. Envision, if you will, the United States divided into six Regions for the distribution of Ford Motor Company

products (G. 61-62).[1] As you look out the window of petitioner Daniels' showroom, you gaze upon one of Ford's three manufacturing plants. Not far away is one of its thirteen assembly plants. From these two Michigan plants cars and trucks are shipped to all points in the Central Region.

Yes, you say, but a percentage of the component parts utilized by Ford Motor Company in the manufacture of its vehicles at its Dearborn, Michigan plant originated outside the State of Michigan. And so they did. This statistic becomes unimportant, however, when you realize that out-of-state suppliers would continue to ship their wares to the Ford Motor Company plants in Michigan if there were not a single Ford dealer in the entire state. The rest of the Central Region must be supplied, and the production lines would continue to roll. Similarly, the parts purchased by Ford Motor Company in interstate commerce all come to rest in Ford depots and warehouses in Michigan from which they are taken by Ford Motor Company as required. Under these circumstances, the interstate flow ceases upon their delivery to the Ford Motor Company in Michigan.

Your petitioners submit, therefore, that they are in a unique position in that they are not the cause of the interstate movement of motor vehicles or parts. In fact, their activities do not affect interstate commerce to any greater degree than the activities of any retailer who handles a nationally distributed product. Naturally, if no one in Michigan purchased Ford products there might be years in which the Ford Motor Company would suffer a drop in

[1] As explained more fully in their brief in opposition to the Board's petition for certiorari the Daniels and Walker cases were consolidated before the Board and the Gilbert case was consolidated with the Daniels-Walker case for purposes of oral argument in the United States Court of Appeals for the Sixth Circuit. For purposes of this petition the Gilbert record is cited as "G".

gross sales. Surely, however, the line between interstate and intra-state commerce is not so finely spun.

> "The well settled test of the applicability to specific operations is whether a 'stoppage of * * * operations by industrial strife' in the enterprise in question would result in substantial interruption to or interference with the free flow of commerce." (*Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 220-221; *N. L. R. B. v. Bradford Dyeing Association*, 310 U. S. 318, 326).

III

We come now to the Board's proposition that your petitioners are an integral part of the Ford Motor Company. Would that they were! Then when overstocked beyond their sales requirements they could return their surplus vehicles to the "vast Ford industrial empire" and let another "integral part" sell them. No, the hard facts are that these petitioners are individually owned and operated, privately financed retail merchants. They purchase vehicles, parts and accessories from the Ford Motor Company and sell them to their customers.

It is true that they signed a Ford Sales Agreement but this agreement is in no way as restrictive as that presented in the *Howell case*. Illustrative of this point are these three paragraphs in the General Motors Selling Agreement, which have no counterpart in the Ford Sales Agreement.

(1) "11. Dealers Personal Services.

> Each person named in Paragraph third of this Agreement shall devote his full time, attention and energy to the conduct of dealers business hereunder."

(2) "12. Dealers Place of Business

Satisfactory to Seller.

* * * dealer will not move to or establish a new location, branch sales office, branch service station or place of business, including any used car lot or location without the prior written consent of seller."

(3) "14. Capital Requirements.

Since the amount and structure of working capital and net worth required to handle properly the business to be conducted by dealer hereunder depends upon many factors, including size of market, sales and service facilities required, anticipated volume and others, and since seller has set standards for dealer capital and net worth based upon seller's past experience, dealer shall establish his owned net working capital and net worth in the respective amount and form specified by seller. If the amount of owned net working capital or net worth or the way in which either is set up is now or hereafter inadequate in seller's estimation for the proper handling of dealer's business, dealer will take the necessary steps to meet seller's applicable requirements within the time determined by seller."

Aside from the terms of the agreement, the Ford Motor Company does not in practice exercise sweeping control over your petitioners. The records in the instant cases clearly show that they enjoy freedom of action and opportunity for individual initiative in the sale of their products (G. 8-105).

It is for these reasons that Courts of various jurisdictions have held Ford dealers to be independent contractors.

Burkhalter v. Ford Motor Company, 116 S.E. 333;
Ford Motor Company v. Union Motor Sales Co., CCA 6th. 244 F. 156.

As the Court said in the *Burkhalter case*, at Page 337:

> "The relation established by the contract was that of vendor and purchaser, and not that of principal and agent."

IV

As your petitioners read the Order herein and pondered the fate of the distinction between interstate and intra-state commerce they were reminded of KoKo's line in the Mikado, "Consequently that gentleman is as good as dead—practically he is dead—and if he is dead why not say so?"

Your petitioners believe that to extend the *Howell decision* to the facts above set forth and to hold that they are engaged in an activity affecting interstate commerce within the meaning of the National Labor Relations Act merely because they are parties to the Ford Sales Agreement is to transcend anything contemplated by the framers of the commerce clause. This Court put it very well in the case of *N. L. R. B. v. Jones & Laughlin Steel Corporation*, 301 U. S. 1 at Page 37, when it said:

> "Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them in view of our complex society would eventually obliterate the distinction between what is national and what is local and create a completely centralized government."

What legal or factual distinction can be made between the activities of these petitioners and those of any retailer from Bangor, Maine to Bakersfield, California who handles a nationally distributed product? It is axiomatic that all

manufacturers must exercise some control over the activities of the retailer who handles their product so that the jealously guarded reputation of the particular "brand name" will not be impaired. So it is that the television dealer must install, adjust and service the sets he sells in accordance with factory specifications and warranties. The corner druggist must not sell camera film after a certain date. A local paint dealer must rotate his stock in accordance with manufacturer's instructions and must return all paint not sold within a specified period. Even the corner grocer must not sell his milk after the date stamped on the carton.

These retailers, too, are subject to a certain amount of supervision. Salesmen call to counsel them on advertising and display policies, and to verify that the manufacturer's policies are being carried out with respect to marketing and distribution of the product.

The distinctions which exist in the relationship between the Ford Motor Company and your petitioners and the relationship of any other manufacturer and its retail outlets are only distinctions occasioned by the very nature of motor vehicles. They are merely differences of degree and not of substance.

As they file this petition your petitioners are mindful of what this Court said in the case of *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197 at Page 223:

> "Justification for the exercise of Federal power should clearly appear."

They are likewise mindful of the fact that the decision of the United States Court of Appeals for the Sixth Circuit was rendered only after consideration of complete briefs submitted by each side and oral arguments of counsel for the Board and your petitioners.

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They respectfully submit that the issues presented herein are of overwhelming importance to these petitioners and the other Ford dealers in the State of Michigan. This Court, by granting certiorari, has recognized the national importance of these cases. Your petitioners, therefore, respectfully urge that in view of this fact they be permitted to be heard in support of their position and in support of the decision of the United States Court of Appeals for the Sixth Circuit.

Conclusion

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this Petition for Rehearing be granted and that the judgment of the United States Court of Appeals for the Sixth Circuit upon further consideration, be affirmed.

Respectfully submitted,

FRANK E. KENNEY,
Counsel for
Bill Daniels, Inc.,
Walker Motors, Inc., and
Gilbert Motor Sales, Inc.

January, 1954

CERTIFICATE OF COUNSEL

I, counsel for the above named respondents, do hereby certify that the foregoing Petition for Rehearing of this cause is presented in good faith and not for delay.

FRANK E. KENNEY,
Counsel for
Bill Daniels, Inc.,
Walker Motors, Inc., and
Gilbert Motor Sales, Inc.

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